SUPREME COURT, U.S.

MAY 16 1956

IN THE

Supreme Court of the United States

OCTOBER TERM, 1955

No. 227

UNITED MINE WORKERS OF AMERICA, ET AL.,
Petitioners,

v.

ARKANSAS OAK FLOORING COMPANY,
Respondent.

On Writ of Certiorari to the Supreme Court of the State of Louisiana

RESPONDENT'S PETITION FOR REHEARING

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Printed by Law Reporter Printing Co., 518 5th St., Wash., D. C.

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RESPONDENT'S PETITION FOR REHEARING

Respondent is asking for rehearing in this case because it believes that the Court's opinion of April 23, 1956, is based upon a serious misconception of the rules of decision of the National Labor Relations Board, and hence the judgment, if permitted to stand, would defeat a major purpose of the Taft-Hartley Act by granting unions refusing to comply with the filing requirements greater protection in their organizing activities than is accorded unions which have submitted the required financial reports and Communist disclaimers.[1]

We are aware that the Court is justifiably reluctant to entertain petitions for rehearing filed by losing litigants in

[1] Sections 9(f), (g) and (h).

a case of first impression. We earnestly submit, however, that an exception should be made in this instance, because the erroneous premise upon which the decision turned was founded upon a brief *amicus curiae* filed in behalf of the National Labor Relations Board, which neglected—unintentionally, no doubt—to mention certain Board policies and decisions, which if drawn to the attention of the Court would have cast an entirely different light upon the principal issue.

The issue posed in this Court was whether the highest court in Louisiana was in error in holding that the Taft-Hartley Act did not deprive state courts of jurisdiction to grant injunctive relief against recognition picketing by a labor organization whose non-compliance with the filing provision of the Federal statute prevented it from proving its asserted right to represent a majority of the employees, either in an election proceeding, or in an unfair labor practice case before the agency which this Court repeatedly has said has exclusive jurisdiction to determine such an issue.[2]

In reversing the holding of the Supreme Court of Louisiana, this Court expressly rested its judgment upon the premise that the picketing union represented a majority of the workers, and that there was no *bona fide* dispute as to this issue. From this premise, the Court reasoned that the employer was under an obligation to bargain with the union under the substantive provisions of the Federal law. Consequently, this Court concluded the injunction was in derogation of the implicit right of a majority union to bring

[2] This Court first noted the exclusive character of the Board's jurisdiction in *Meyers* v. *Bethlehem Shipbuilding Corporation*, 303 U.S. 41 and shortly thereafter in *Re National Labor Relations Board*, 304 U.S. 486, and in *American Federation of Labor* v. *National Labor Relations Board*, 308 U.S. 401. In *Re National Labor Relations Board, supra*, at Page 493, after noting that the Board had the sole jurisdiction to issue final orders under the Act, this Court asserted that the courts, lacking jurisdiction, "must refrain from any adjudication of rights in connection therewith," except under Section 10 of the Act, which provides for court review of such final orders as the Board may issue.

economic pressure to enforce this obligation, taking the view that the filing requirements were simply intended to deprive recalcitrant labor organizations representing the majority of administrative relief but not self help. The Court brushed aside the argument that such a view gave advantages to non complying unions by stating that, under Board decisions, non complying unions were not immune from unfair labor practice orders and could be the subject of decertification proceedings.

If the factual assumptions of the Court were correct, there could be little quarrel with this reasoning, except, of course, upon such broader issues of policy as Mr. Justice Frankfurter adverted to in his dissent. But we submit that its assumptions were at fault in two major particulars.

1. In the absence of an election, even the Board could not certify that a majority of the employees has selected any union as their representative for the purposes of collective bargaining under Section 9(a). Thus the Court erred, not only in deciding a question which it has previously held the courts lack jurisdiction to determine, but in deciding it on evidence which the Taft-Hartley Act precludes the Board from relying upon in representation cases.[1]

While the Board has issued orders to bargain in proceedings under Section 8(a)(5) of the Act without an election where the majority status of the union is evidenced by designation cards and where the union is in compliance with Sections 9(f), (g) and (h), it has done so only where the employer's professed doubt as to the majority status of the union is found not to be a *bona fide* doubt. But in no case has the Board found that the employers doubt as to the union's majority status was not *bona fide* simply because the

[1] Section 9(c), of the Wagner Act permitted the Board to certify a union as the majority representative after it had determined the wishes of the employees by means of a secret ballot or by "any other suitable method." The Taft-Hartley Act provides that no certification under Section 9(c) of the Act can be issued by the Board except after an election by secret ballot.

union had designation cards from a majority of the employees.[4]

2. Neither the employer[5] nor any employees[6] could have filed a petition a petition to test the Union's claim of majority status under the circumstances of this case.

Thus, this Court conferred an advantage on the non-complying union in this case which a complying union could not have enjoyed.

A complying union could not have relied on its designation cards to establish itself as the majority representative

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[4] See *Felton Oil Company*, 78 NLRB 1033; *Whitneys*, 81 NLRB 75; *Continental Southern Corporation*, 83 NLRB 668, 669; *J. P. O'Neil Lumber Company*, 94 NLRB 1299; *Andrews Industries, Inc.*, 105 NLRB 946. See also *Philadelphia Electric Company*, 95 NLRB 71, where the Board held that a bona fide question concerning representation existed even though *all* employees were members of the union under a compulsory union membership clause of a contract executed after the union had secured authorization from the employees for such a contract under the so-called union shop authorization election provisions then contained in the Act. As to the Board's policy in unfair labor practice cases arising under Section 8(a)(5) of the Act, see *Roanoke Public Warehouse*, 72 NLRB 1281, and *United States Gypsum Company*, 90 NLRB 964. The representation cases cited in this note make it clear that the Board will not refuse to process petitions filed by employers or employees simply because the union claiming a majority possesses designation cards evidencing such majority. In the unfair labor practice cases, the Board has not relied on designation cards to prove a union's majority, except where the employer failed to file a petition under Section 9(c)(1)(B) or where, while professing to doubt the union's majority status, the employer engaged in other unfair labor practices prohibited by Section 8 of the Act.

[5] See *Herman Loewenstein, Inc.*, 75 NLRB 377, and the 13th Annual Report of the Board (1948) which states (Page 22, Footnote 14), "this ruling would require the dismissal of the petition [filed by an employer] if only one union is involved, and it is not in compliance."

[6] The Board will process a decertification petition filed by employees under Section 9(c)(1)(A) of the Act only where the Union "has been certified or is being currently recognized by their employer as the bargaining representative." See *Queen City Warehouses, Inc.*, 77 NLRB 268 and *Hackathorn & Myers*, 90 NLRB 75. In the instant case, the employer was not, of course, "currently recognizing" the union, nor had it been "certified." In *Harris-Foundry and Machinery Company*, 76 NLRB 118, the only decertification case cited by the Board in its brief to this Court, the Board directed an election upon a petition filed by employees where the union was not in compliance, because the union had previously been certified by the Board after an election held under Section 9(c) of the Wagner Act.

under Section 9(a) or Section 8(a)(5) of the Act and would therefore have been forced to an election. If an election proved, as has been frequently the case, that designation cards did not reflect the true wishes of the employees and that therefore the union was in fact a minority union, the injunction issued by the state court would have been valid.[7] Congress added the requirements of Section 9(f), (g) and (h) of the Act, obviously, because it believed that some unions were communist dominated or were reluctant to inform their members concerning financial and other affairs of their union. Such a union would, for obvious reasons, prefer to establish its majority status by means of designation cards, rather than to establish it by means of a secret ballot election conducted by the Board. The Court's decision of April 23, 1956, will, if permitted to stand, actually constitute an advantage to such a union.

Perhaps even more important, however, the Court's opinion deprives both the employees and the employer of any protection to their rights, which Congress provided in the Taft-Hartley Act, to test by an election a union's claim to majority status. Here the union, by its non-compliance, has made these rights unavailable to the employer, and this Court's opinion has closed the door to whatever protection the state courts could otherwise provide. Thus, rights granted employers by the Taft-Hartley Act are erased; safeguards designed to insure representation by a union of the employees' choice are limited; and non-complying

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[7] The Board, in its brief *amicus curiae* (Page 24), asserts that even if the picketing and strike here were activities of a minority union, the state injunctive relief would have been improper. But, if as the Board found in *Perry Norvell Company*, 80 NLRB 225, 238-241, picketing by a minority union is not a union unfair labor practice proscribed by the Act, and if such picketing is not protected by the Act, as the courts have found in *Hoover Company* v. *National Labor Relations Board*, 191 F. 2d 380 (CCA-6); and in *Ohio Ferro-Alloys Corporation* v. *National Labor Relations Board*, 213 F. 2d 546 (CCA-6), the union's activity here was neither forbidden by Federal statute nor was it legalized and approved thereby. Under these circumstances, there was no basis for denying to the state the power to control the activity. See *International Union* v. *Wisconsin Employment Relations Board*, 336 U.S. 245.

unions, which [illegible] representative status is now exempted from Federal administrative determination, obtain immunity from state regulation, although such unions presumably require regulation more than others.

CONCLUSION

For the reasons set forth above, and in respondent's brief, it is respectfully urged that rehearing be granted and that, upon such rehearing, the decision of the Supreme Court of Louisiana be affirmed.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

We hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay, and is restricted to grounds specified in Rule 33 of the Rules of this Court.

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PROOF OF SERVICE

I hereby certify that I have deposited in the United States Mail, with sufficient air mail postage thereon insured delivery, copies of the foregoing petition for rehearing addressed to all counsel for United Mine Workers of America, et al., petitioners, one copy being addressed to Honorable Crampton Harris, 1018-19 First National Bank Building, Birmingham 3, Alabama; one copy to Honorable James L. McCain, 818 Whitney Building, New Orleans, Louisiana; one copy to Honorable Yelverton Cowherd, 900 Fifteenth Street, N.W., Washington 5, D. C.; and one copy to Honorable Alfred D. Treherne, 900 Fifteenth Street, N.W., Washington 5, D. C., on this 18th day of May, 1956.

I further certify that I have placed in the United States Mail, three copies of the foregoing petition for rehearing, addressed to the Solicitor General, Department of Justice, Washington 25, D. C., with postage thereon fully prepaid to insure delivery, on this 18th day of May, 1956.

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